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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 251

COLOGERO FASULO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals in the above case may be found at page 169 of the Record, and also in 7 Fed. (2d), 961.

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered on September 14, 1925. (R. 174.) Motion for rehearing was made, entertained, and denied on October 19, 1925. (R. 175.) This Court on January 11, 1926, granted a writ of certiorari under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

STATEMENT

Petitioner was convicted under an indictment charging him and others with conspiring to violate Section 215 of the Criminal Code of the United States, viz., to devise a scheme or artifice to defraud and use the mails in execution or attempted execution of such scheme. The scheme covered the attempt to extort money under threats of murder or bodily harm (R. 3); and petitioner's main contention here relied on is that such a scheme is not within the reach of Section 215 of the Criminal Code of the United States, and also that in giving certain instructions the court committed error. Section 215 of the Criminal Code is as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal

in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars or imprisoned not more than five years, or both.

SUMMARY OF ARGUMENT

I. The use of the mails for the purpose of securing money by means of threats is a scheme to defraud and constitutes an offense under Section 215 of the Federal Criminal Code. In a broad sense,

obtaining money by threats of injury to person or property is obtaining money by fraud. The statute was so construed in 1902 by a Circuit Court of Appeals and certiorari was denied by this Court. That construction stood unquestioned for twenty-one years. Congress has acquiesced in and accepted it. Its failure to enact legislation prohibiting use of mails for extortion is only explained because the existing statutes so construed covered the case.

II. There was no reversible error in the court's charge to the jury.

(A) Petitioner waived objections and exceptions to the instructions given.

(B) The court did not commit error in giving instruction assigned as Error No. 14.

(C) The court did not commit error in giving instruction assigned as Error No. 13.

(D) Admitting, arguendo, that the language used in instruction assigned as Error No. 13 is error, there is nothing tending to show that the petitioner was prejudiced thereby.

(E) The court did not commit error in refusing to allow Fasulo's wife to testify in his behalf.

ARGUMENT

I

The Use of the Mails for the Purpose of Securing Money by Means of Threats Constitutes an Offense Indictable Under Section 215 of the Federal Criminal Code

Petitioner argues that the statute covers only obtaining money or property by deceit, trickery, or chicane. The statute was intended by Congress, and has been properly construed by the courts, to cover the evil of obtaining money or property of another by dishonest means.

The application of this statute to a scheme to extort money or property by blackmail was recognized by Mr. Justice Brewer on circuit in 1894:

> The defendant caused to be passed through the mails a letter purporting to be from the United States district attorney to himself in reference to the furnishing of testimony tending to show Stephens liable to the government, and then caused the letter thus passing through the post office to be sent by one apparently a stranger, to Stephens, the intention and expectation being that thereby Stephens would be frightened—blackmailed—into paying the claim of Kearney, in defendant's hands for collection, in order to prevent any disclosures by defendant to the United States district attorney. Now, that the post office was used to carry this letter; that the defendant was the one who thus used the post office for the transmission

> of the letter—is plainly alleged. That there was a scheme or artifice to defraud is charged, and, indeed, is obvious. [*Weeber* v. *United States* (C. C. 8th, 1894), 62 Fed. 740, 741.]

This was followed by the leading case of *Horman* v. *United States* (C. C. A. 6th, 1902), 116 Fed. 350, 351, opinion by Judge, later Mr. Justice, Day:

> The gist of the offense is the criminal use of the mails of the United States. *U. S.* v. *Jones* (C. C.) 10 Fed. 469. It is the purpose of the statute to prevent their use in aid of schemes and artifices having in view the defrauding of others of their money and property. It is claimed in behalf of the plaintiff in error that the use of the phrase "any scheme or artifice to defraud" necessarily limits the operation of the statute to such schemes or artifices as are accomplished by deception or trick adapted to defraud. It is said that only by such means can another be defrauded, within the proper meaning of the statute; that in the present indictment no deception is charged; that the persons charged knew whether the threatened exposure was of matters true or false, and hence could not be defrauded if they paid their money for silence. The phrase "scheme or artifice to defraud" is to be construed bearing in mind the underlying purpose of the statute to preserve the use of the mails to legitimate ends. * * * What is here meant by "to defraud"? Obviously the statute is dealing with the wrongful purpose to injure, with which the scheme or

> artifice must be connected. These words, in the phrase quoted, are not descriptive of the character of the artifice or scheme which has been devised, but rather of the wrongful purpose involved in devising the same, and putting it into operation by means of the mail. This purpose must be to injure, which doubtless may be inferred when the scheme has such effect as a necessary result of carrying it out.

Certiorari to review the decision in the *Horman case* was denied by this Court (187 U. S. 641).

Petitioner suggests that the *Horman case* is not in point because of the addition to R. S. 5480 made in 1909. The answer appears to be that this Court has since expressly recognized the authority of the *Horman case*. *Hammerschmidt* v. *United States* (1924), 265 U. S. 182, 188:

> It is true that the words "to defraud" as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes. One would not class robbery or burglary among frauds. In *Horman* v. *United States*, 116 Fed. 350, Sec. 5480, Rev. Stats., as amended March 2, 1889, c. 393, 25 Stat. 873, making it a crime to devise any scheme or artifice to defraud by use of the mails and opening correspondence

with any person, and to mail a letter in execution thereof, was held to be violated by the sending of a letter threatening to blacken the character of another unless that other paid the blackmailer money. It was held that the word "scheme" in that section was of broader meaning and did not necessarily involve trickery or cunning in the scheme, if use of the mails was part of it; that intent to defraud in such a statute was satisfied by the wrongful purpose of injuring one in his property rights. The question had much consideration. The decision, however, went to the verge and should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose. Section 5480 has since been again amended to make its scope clearer.

This makes clear the opinion of the Court, in accord with the case of *Durland* v. *United States* (1896), 161 U. S. 306, that the word "defraud" is directed to the case of "wronging one in his property rights by dishonest methods or schemes."

Obviously it does "not extend to theft by violence," but it does extend to blackmail. The method of deprivation in the one case is physical coercion, in the other mental coercion based on the use of the mails.

It has been more than once recognized that the word "defraud" in a Federal statute carries a broader meaning than at common law. *Durland* v. *United States, supra; United States* v. *Stever,*

222 U. S. 167, 173. Having passed the limits of the common-law definition, we find that the next circle of classification embraces all dishonest methods of deprivation, "the gist of which" is the use of the mails. The case of blackmail is no doubt at "the verge," but it is not without the circle of construction justified by the intent of Congress and the common meaning of words.

Other cases in the lower Federal courts are:

United States v. *Raish* (S. D. Ills. 1908), 163 Fed. 911;

United States v. *Goldman* (N. D. Ohio, 1913), 207 Fed. 1002; and

Naponiello v. *United States* (C. C. A. 7th, 1923), 291 Fed. 1008.

In the *Raish case* two officers of a trade-union were convicted under Section 5480 of an attempt, by inducing the customers of a manufacturing corporation, through the mails, to withdraw their patronage, to compel the corporation to pay a fine of $500, and employ union men.

The *Goldman case* involved the mailing of a letter to a woman with the intent of employing her to place persons of prominence in a compromising position so that they might be blackmailed by defendant. Motion to quash and demurrer were overruled.

Naponiello v. *United States* is a decision directly contrary to the Government's position in the case at bar. It is submitted that it is in conflict with the weight of authority and in error.

In determining the meaning which Congress intended should be given to Section 215 it is a significant fact that the phrase used in Section 5480 of the Revised Statutes, "any scheme or artifice to defraud," was embodied in Section 215 of the Criminal Code. It is further significant that all of the above-cited cases turned upon the meaning of that phrase in Section 5480. Three of the cases specifically held that the sending of letters through the mails for the purpose of securing a pecuniary advantage by means of threats fell within the meaning of the words "any scheme or artifice to defraud." It was in the light of these decisions that Section 215 of the Criminal Code was adopted. The clear and obvious intention of Congress was to include among the evils attacked by Section 215 the sending of threats through the mails for the purpose of obtaining money or property.

Petitioner refers to the fact that the Criminal Code was formulated by a Commission appointed by the President under authority of an Act of Congress. (Brief, page 14.) The Code was submitted to Congress before the decision in the *Horman case,* but among other cases cited in the Commission's report was *Weeber* v. *United States, supra,* in which the phrase "scheme to defraud" was construed in the opinion of Mr. Justice Brewer to include a case of blackmail. In so far as the intent of Congress, therefore, is to be sought in the report of the Commission, the intended retention of a prohibition of blackmailing through the mails is

indicated in Section 215. *Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States,* Senate Document No. 68, Fifty-seventh Congress, first session.

Petitioner contends that an historical analysis of Section 215 shows that it was not intended to cover cases of "extortion"—that inasmuch as this section is directly traceable to Section 301 of the Act of June 8, 1872, the meaning of the phrase "having devised or intending to devise any scheme or artifice to defraud" can be determined only by reference to the meaning given to it by Section 301. He contends that Section 301 was only one of three sections in the Act of June 8, 1872, dealing with schemes to defraud, and that inasmuch as one of these sections (Section 149) was confined to fraud as understood at common law, Section 301 must be similarly restricted. An examination of the language of these two sections emphasizes the fact that the scope of Section 149 was intended to be narrower than that of Section 301. Section 301 broadly includes "any scheme or artifice to defraud," whereas Section 149 includes " schemes devised and intended to defraud the public for the purpose of obtaining money under false pretenses." The limitation of Section 149 to cases involving "false pretenses" indicates that Congress intended the words "to defraud" as used in Section 301 to include more than the obtaining of money by false pretenses.

The numerous decisions recognizing the broad applicability of "defraud" in Section 215 find support in the recognized definitions of the verb. To restrict the meaning of "defraud" to trick, deceit, chicane, or overreaching would exclude meanings equally well recognized.

> The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent. (*United States* v. *Hartwell*, 6 Wall. 385, 396.)

To defraud is "to defeat or frustrate wrongfully." The Century Dictionary and Cyclopedia. "To deprive of something dishonestly" is to defraud. Standard Dictionary.

> To defraud is to cheat; to deprive another of a right, to withhold wrongfully what is due to him, or to prevent him wrongfully from obtaining what he may justly claim. To "defraud" implies or includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence generally reposed, and are injurious to another, or by which an undue and

> unconscionable advantage is taken of another. [American and English Encyclopedia of Law, vol. 9, p. 180.]

The reasoning in the *Horman case* by Judge Day is sounder than that in the *Naponiello case*, and has behind it more of practical common sense and judgment. Obtaining money by threats of injury is defrauding according to common understanding. It is incredible that Congress has intended all these years to prohibit the use of the mails to defraud by trick or false pretenses but to leave the mails open to use by blackmailers or extortionists. The statute was construed in 1902 by the Circuit Court of Appeals in the *Horman case* to cover a case of obtaining money by threats of injury to character or reputation. There is no distinction between that and the case of threat of injury to person or property. Certiorari was denied by this Court. For a quarter of a century that decision stood unquestioned. Congress has acquiesced in that construction of the law. Its failure to pass bills introduced to prohibit the use of the mails for "blackhand" letters has no doubt been due to the belief that the subject was covered by existing statutes as construed by the courts. The question should have been considered at rest, and the court which considered the *Naponiello case* should have so held. It remains for this Court to settle the question more effectively than it seems to have done by denying certiorari in the *Horman case*.

II

There Was No Reversible Error in the Court's Charge to the Jury

(A) Petitioner Waived Objections and Exceptions to the Instructions Given

The opinion of the Circuit Court of Appeals appears to be decisive (R. 171–173):

> Defendant assigns error upon several instructions given and upon refusal to give certain requests for instructions. As to those given there was no exception taken after the Court charged the jury and before they retired. Before argument, counsel for the defendant asked if it might be stipulated that the defendant have an exception to each and every instruction presented and refused or modified, or to be given "just as fully as when the instructions have been completed and read to the jury we shall have taken such exception and called them to your Honor's attention." The Judge replied that he had no objection, "but if any instruction is unsatisfactory the Court's attention should be called to it so that any error may be corrected; and any such stipulation would defeat that purpose"; and added that he thought the instructions were fair and practically embodied the substance of defendant's requests. Thereupon counsel for defendant said he understood that the Assistant District Attorney, who was prosecuting the case, was willing that the stipulation be made; whereupon the Court said: "Very

well. That may be done for each and all of the defendants" and thereupon proceeded to instruct the jury. When the Court concluded its charge the Judge inquired if there were any subject upon which counsel would like to have the jury instructed. No reply was made and the jury was directed to retire.

It is well established that in order to preserve an exception to an instruction given, counsel should call the Court's attention to the specific matter while the jury is at the bar. The Court, therefore, was right when it said the stipulation made would defeat the correcting of possible errors in the instructions about to be given, but was in error in varying its ruling by apparently giving recognition to the stipulation. However, when, after the charge was delivered the Judge asked counsel if they desired instructions upon any pertinent matter, counsel remained silent, they waived objections and exceptions to the instructions given. Chief Justice Taft, for the Court of Appeals in the recent case of *Brevard Tannin Co.* v. *Mosser Co.*, 288 Fed. 725, cited many decisions, including several by this Court, and said: "The proper manner of reserving exceptions is part of the procedure in error in Federal courts of review, and is not controlled by the conformity provision of the Revised Statutes. *St. Clair* v. *United States*, 154 U. S. 134, 153; 14 Sup. Ct. 1002; 38 L. Ed. 936, and cases cited. It has further been held that an exception taken after the jury retired can not be considered on a

> writ of error under the Federal practice, even if counsel are lulled into not taking exceptions while the jury is at the bar, either by stipulation, by the Court's granting permission to them to do so, or by an invariable practice in the trial court, well known and acted upon by counsel."

(B) THE COURT DID NOT COMMIT ERROR IN GIVING INSTRUCTION ASSIGNED AS ERROR NO. 14

The alleged erroneous instruction follows (R. 134–135):

> The existence of a conspiracy may be manifested either by words or deeds. In this case, therefore, even though you may find there was no open or express declaration of purpose on the part of these defendants or other parties concerned to unite in doing the acts charged, yet if the acts have been committed or accomplished in a manner or under circumstances which, by reason of their situation at the time, and the conditions surrounding, give rise to a reasonable and just inference that they were done as a result of the previous agreement, then you are justified in finding that a conspiracy existed among them to do those acts.

Petitioner contends that this instruction does not clearly nor correctly state the burden of proof which the prosecution must assume to prove its case. But the single statement separated from the language which surrounds it is obviously meaningless. The sentence which follows the instruction

objected to amply defines the burden of proof which the prosecution must assume to prove a conspiracy (R. 121):

> The defendants and each of them are presumed to be innocent, and this presumption continues to operate in their favor until it is overcome by competent evidence, and if the evidence introduced in this case does not overcome this presumption of innocence to your satisfaction to a moral certainty and beyond reasonable doubt, you must find the defendants not guilty.
>
> It is not necessary for the defendants to prove their innocence, but the burden rests upon the prosecution to establish every element of the crime with which the defendants are charged, and every element of the crime must be established to a moral certainty and beyond a reasonable doubt. If the prosecution fails to establish to a moral certainty and beyond a reasonable doubt any one element of the crime with which the defendants are charged and which it is necessary to establish in order to convict, then you must find the defendants not guilty.

(C) THE COURT DID NOT COMMIT ERROR IN GIVING INSTRUCTION ASSIGNED AS ERROR NO. 13

The instruction follows (R. 134):

> Neither the Government nor the defendants are required to call all the persons who have knowledge of any particular evidence. You are instructed that if one side produces one witness who was present at or had knowledge of any particular event, the fail-

> ure to produce other witnesses who were present at or who had knowledge of the same event cannot, in and of itself, be considered as a suppression of evidence on the part of the same side, and you are not to take such failure to produce such other witnesses as evidence that such witnesses would testify against the side which failed to call such witness or witnesses.

This instruction is carefully limited in scope to a failure to call corroborative witnesses. So limited it is correct, especially in a case where any missing witnesses are equally available to either side. *Egan* v. *United States* (Ct. App. D. C. 1922), 52 App. D. C. 384, 391; S. C. 287 Fed. 958, 969; 22 Corpus Juris 117–119, and cases cited. Failure to multiply witnesses is not "in and of itself" proof either of innocence or guilt. We are not here concerned with a case where it would be natural to suppose that a witness would have been produced if the facts known to him had been favorable.

(D) ADMITTING, ARGUENDO, THAT THE LANGUAGE USED IN INSTRUCTION ASSIGNED AS ERROR NO. 13 IS ERROR, THERE IS NOTHING TENDING TO SHOW THAT THE PETITIONER WAS PREJUDICED THEREBY

On this matter the record is silent. Normally the accused is more damaged by the presumption applying to failure to produce witnesses than the prosecution. There is nothing in the record which would indicate that this case is in that regard exceptional.

(E) THE COURT DID NOT COMMIT ERROR IN REFUSING TO ALLOW FASULO'S WIFE TO TESTIFY IN HIS BEHALF

A defendant's wife is not a competent witness.

> The rule that excludes a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give. [*Jin Fuey Moy* v. *United States*, 254 U. S. 189, 195.]

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

WILLIAM J. DONOVAN,
Assistant to the Attorney General.

WILLIAM D. WHITNEY,
Special Assistant to the Attorney General.

OCTOBER, 1926.

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